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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 727

THE SHAMROCK OIL AND GAS CORPORATION,
Petitioner,

vs.

G. OBIE SHEETS AND CHESTER SHEETS, DOING BUSINESS AS FRIONA INDEPENDENT OIL COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Shamrock Oil and Gas Corporation, a corporation organized under the laws of the State of Delaware, prays this Court for the issuance of a writ of certiorari to review a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered on

the 6th day of December, 1940, reversing a decree of the United States District Court for the Northern District of Texas, Amarillo Division, and remanding this case to the United States District Court for the Northern District of Texas with instructions to remand same to the State Court from which it was removed.

Statement of the Matter Involved.

The matter involved herein is a question of removal jurisdiction and the proper construction of the removal statute, being Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71). It was held by the Honorable Circuit Court of Appeals for the Fifth Circuit (R. 127) that the petitioner was not entitled under the removal statute as the cross-defendant in a counterclaim or cross-action to remove the counterclaim to the Federal Court, the basis of such decision being that since the petitioner had been the original plaintiff, it was not a defendant within the meaning of the statute referred to.

The petitioner, a Delaware corporation, sued the respondents in the District Court of Potter County, Texas, on an account for petroleum products sold respondents in the amount of $5,390.42 (R. 1 to 60). On the filing of a plea of privilege by respondents (R. 61) the venue of such suit was transferred to the District Court of Parmer County, Texas (R. 62-63). The respondents filed their original answer in the District Court of Parmer County, Texas (R. 64), and in such answer filed their cross-action or counterclaim (R. 67-68), wherein respondents, citizens of Texas, sought to recover damages in amount of $7,200.00 for the alleged breach of contracts relative to the leasing of an automobile truck, which contracts were separate, distinct and unrelated to the indebtedness originally sued upon. Petitioner, as defendant in the cross-action, filed its petition for removal and removed the cause to the United States

District Court for the Northern District of Texas, Amarillo Division (R. 69 to 76), on the grounds (R. 69 to 70) that the cross-action presented a separate and distinct suit by respondents, citizens of Texas, against petitioner, a citizen of Delaware, for $7,200.00 damages. Respondents moved to remand (R. 76), which motion was denied (R. 80), and an unreported opinion of the Trial Court was rendered (R. 108) in open court. After trial on merits and judgment for petitioner was rendered on both the original suit and counterclaim (R. 81), respondents filed a motion for reconsideration of their motion to remand (R. 85 to 93), which motion was overruled by the Trial Court (R. 93). Respondents appealed to the United States Circuit Court of Appeals for the Fifth Circuit from the order overruling their motion to remand and from the judgment of the court overruling respondents' motion for a reconsideration of the court's order overruling motion to remand (R. 103 to 107).

The United States Circuit Court of Appeals entered its judgment on the 6th day of December, 1940, reversing the judgment appealed from and remanded this cause to the Trial Court with instructions to remand same to the State Court from which it was removed (R. 134). An opinion in this cause was filed by the Circuit Court of Appeals on the 6th day of December, 1940 (R. 127), 115 F. (2d) 880, in which it was held that Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71) does not permit the removal of a cross-action or counterclaim for more than $3,000.00 involving the alleged breach of contracts distinct and separate from the indebtedness originally sued upon, at the instance of a non-resident cross-defendant, if such party had been the original plaintiff in the State Court. The petitioner filed its petition for rehearing on the 26th day of December, 1940 (R. 136), which petition was denied by a judgment entered on the 14th day of January, 1941 (R. 145).

Basis of Jurisdiction.

The judgment sought to be reviewed is the judgment of the United States Circuit Court of Appeals for the Fifth Circuit rendered on the 6th day of December, 1940 (R. 134) reversing the judgment of the United States District Court for the Northern District of Texas, Amarillo Division, and remanding this case to such court with instructions to remand same to the State Court from which it was removed. The nature of the case presented is fully set out in the preceding statement of the matter involved, but is one involving a question of removal jurisdiction and the proper construction of Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71). The unreported oral opinion (R. 108) of the District Judge for the United States District Court for the Northern District of Texas reflects the judgment of the Trial Court to the effect that this cause was properly removed to the Federal Court by the petitioner. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit filed on the 6th day of December, 1940 (R. 128) 115 F. (2d) 880 reflects the decision of said court to be that Section 28 of the Judicial Code does not permit the removal of this case by the petitioner from the State Court to the Federal Court. Petition for rehearing was filed on the 26th day of December, 1940 (R. 136) and same was denied on the 14th day of January, 1941 (R. 145). Petition for writ of certiorari is presented herein on the 30th day of January, 1941.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as Amended by the Act of February 13, 1925, c. 229, Section 1, (43 Stat. 938) (28 U. S. C. A. Section 347). The jurisdiction of this honorable Court under such statute to review by certiorari a judgment of a Circuit Court of Appeals remanding a case to the District Court with instructions to remand to the State Court from which it was removed, such as is here

involved, was sustained in *Gay* v. *Ruff*, 292 U. S. 25, 54 S. C. 608, 78 L. Ed. 1099. Such holding was referred to and reaffirmed in *Employers Reinsurance Corporation* v. *Bryant*, (Note 9) 299 U. S. 374, 57 S. C. 273, 81 L. Ed. 289.

Questions Presented.

I.

The primary question presented is:

> Whether a counter-claim or cross-action, set up by resident defendants in a State Court seeking damages against the original non-resident plaintiff in the amount of $7,200.00 for the alleged breach of a separate and distinct contract from the $5,390.42 indebtedness due on open account and originally sued upon, is a suit which is removable by the defendant in the cross-action (petitioner), who had been the original plaintiff, on the grounds of diversity of citizenship under Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71)?

II.

A second question is presented in this case, but petitioner does not claim that this question alone would warrant the granting of a writ of certiorari, but same is presented for the Court's consideration and so that it may be properly preserved:

> Whether the order or judgment of the Trial Court overruling respondents' motion for a reconsideration of the Trial Court's previous order overruling motion to remand, which motion to reconsider was filed after final judgment on merits had been entered, is such a final judgment as would authorize the appeal by respondents to the United States Circuit Court of Appeals, Fifth Circuit?

Reasons Relied on for the Allowance of the Writ.

Reasons I to III hereafter are referable to Question No. I.

Reason I.

The judgment and decision of the Circuit Court of Appeals herein, to the effect that the petitioner was not entitled to remove the cross-action of respondents to the Federal court, even though the cross-action admittedly sought affirmative relief for damages totaling $7,200.00 for breach of contracts unrelated to the original suit, for the reason that Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71) grants the right to remove a suit to the original defendants only, and that such a cross-action was not a suit within such statute, conflicts with prior decisions (hereafter cited) of other Circuit Courts of Appeals and with a prior decision of the Circuit Court of Appeals for the Fifth Circuit. The Circuit Court of Appeals in its opinion herein acknowledges that its decision and holding upon such point is in conflict with the following prior decisions of other Circuit Courts of Appeals and District Courts (R. 129-130): *Bankers Securities Corporation* v. *Insurance Equities Corporation* (1936, C. C. A. N. J. Third Circuit) 85 F. (2d) 856; *Chambers* v. *Skelly Oil Company* (1937, C. C. A. Kans. Tenth Circuit) 87 F. (2d) 853; *Carson & Rand Lumber Co.* v. *Holtzclaw* (1889, C. C. Mo.), 39 Fed. 578; *Walcott* v. *Watson* (1891, C. C. Nev.), 46 Fed. 529; *Price & Hart* v. *T. J. Ellis & Co.* (1904, C. C. Ark.), 129 Fed. 482; *Hagerla* v. *Mississippi River Power Co.* (1912, D. C. Iowa), 202 Fed. 771; *Hansen* v. *Pacific Coast Asphalt Cement Co.* (1917, D. C. Cal.), 243 Fed. 283, 284; *Consolidated Textile Corporation* v. *Iserson* (1923, D. C. N. Y.), 294 Fed. 289; *Pierce* v. *Desmond* (1926, D. C. Minn.), 11 F. (2d) 327; *Zumbrunn* v. *Schwartz* (1927, D. C. Ind.), 17 F. (2d) 609; *O'Neill Bros.* v. *Crowley* (1938, D. C. S. C.), 24

Fed. Supp. 705; *San Antonio Suburban Irrigated Farms* v. *Shandy* (1928, D. C. Kans.), 29 F. (2d) 579. Petitioner further submits that the holding of the honorable Circuit Court of Appeals for the Fifth Circuit in the case of *Wichita Royalty Company* v. *City National Bank* (1938, C. C. A. Tex. Fifth Circuit) 95 F. (2d) 671, 97 F. (2d) 249, (1937, D. C. Tex.) 18 Fed. Supp. 609 (affirmed without reference to question of removal jurisdiction, 306 U. S. 103, 83 L. Ed. 515, 59 S. C. 420), conflicts with the decision and holding of the Circuit Court of Appeals in this case, though same was sought to be distinguished by the Circuit Court of Appeals herein from the instant case on the grounds that the basis for removal therein was a Federal question and not diversity of citizenship.

Reason II.

The honorable Circuit Court of Appeals has decided an important question of Federal law involving the proper construction of a Federal statute, to-wit, Section 28 of Judicial Code as Amended (28 U. S. C. A. Section 71), which question has not been, but should be, settled by the Supreme Court. Since the enactment of Section 28 of the Judicial Code (28 U. S. C. A. Section 71) in substantially its present form by the Judiciary Acts of 1887 and 1888 (Act of March 3, 1887, 24 Stat., Ch. 373, p. 522; Act of August 13, 1888, 25 Stat., Ch. 866, p. 433) more than twenty-five reported cases have passed upon the question of the right of a defendant in a cross-action or counter-claim filed in a State Court seeking affirmative relief to remove such counter-claim or cross-action to the Federal Courts. These cases, many of which are cited under Point I of brief which follows are in hopeless conflict and the holdings therein diametrically opposed upon such question. The Supreme Court of the United States has not passed upon such question under the act of 1887 (Act of March 3, 1887, 24 Stat.,

Ch. 373, p. 552) and its amendments. The case of *West* v. *Aurora City* (1867), 73 U. S. 193, 6 Wall. 139, 18 L. Ed. 819, decided under the Judiciary Act of 1789 (Act of September 24, 1789, c. 20, 1 Stat. 73) is cited by the Circuit Court of Appeals for the Fifth Circuit in the instant case as being controlling on the question presented, and on the construction of the present removal statute. In so holding the decision of the honorable Circuit Court of Appeals conflicts with the decisions in the following cases in which it was held that the case of *West* v. *Aurora City, supra,* is not applicable to the present removal statute because of difference in the language of the two acts, or that such decision is distinguishable upon other grounds upon the question here presented. The cases so holding are: *Habermel* v. *Mong* (1929, C. C. A. Sixth Circuit, Tenn.), 31 f. (2d) 822 (writ of certiorari denied *Habermel* v. *Mong* [1929] 280 U. S. 587, 74 L. Ed. 636, 30 S. C. 37); *San Antonio Suburban Irrigated Farms* v. *Shandy* (1928, D. C. Kan.), 29 F. (2d) 579; *O'Neill Bros.* v. *Crowley* (1938, D. C. S. C.), 24 Fed. Supp. 705; *Zumbrunn* v. *Schwartz* (1927, D. C. Ind.), 17 F. (2d) 609; *Price & Hart* v. *T. J. Ellis & Co.* (Cir. Co. Ark. 1904), 129 Fed. 482; *Ward* v. *Congress Construction Company* (1900, C. C. A. Seventh Circuit), 99 Fed. 598; *Pierce* v. *Desmond* (1926, D. C. Minn.), 11 F. (2d) 327; *Hagerla* v. *Mississippi River Power Company* (1912, D. C. Iowa), 202 Fed. 771; *Walcott* v. *Watson* (1891, Cir. C. Nev.), 46 Fed. 529. The Circuit Court of Appeals recognizes in its opinion (R. 132-133) that such conflict exists.

Reason III.

The honorable Circuit Court of Appeals, in holding, as it did in the instant case, that the petitioner, having been the original plaintiff in the State Court, was not entitled under Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71), to remove the cross-action filed by

the respondents to the Federal Court, has decided a Federal question involving the proper construction of such statute in a way that conflicts with the applicable decisions of the Supreme Court in the cases of *Merchant's Heat and Light Company* v. *James B. Clow & Sons* (1907) 204 U. S. 286, 51 L. Ed. 488, 27 S. C. 285, and *W. S. Kirby* v. *American Soda Fountain Company* (1904) 194 U. S. 141, 48 L. Ed. 911, 24 S. C. 619, which cases recognize that when an original defendant files a cross-action or counter-claim the original defendant becomes as to such cross-action the actor or plaintiff and the original plaintiff becomes as to such cross-action or counter-claim the defendant. The opinion and holding of the Circuit Court of Appeals herein likewise conflicts with the following applicable decisions of the Supreme Court, which hold that under the Judiciary Act of 1887 and 1888 in determining the right of removal the parties should be realigned in accordance with the matter in dispute, and without regard to the position they occupy in the pleadings as plaintiff or defendant: *Removal Cases,* (1879), 100 U. S. 457, 25 L. Ed. 593; *Brown* v. *Ironsdale,* (1891), 138 U. S. 389, 11 S. C. 308, 34 L. Ed. 987; *Wilson* v. *Oswego Township* (1894), 151 U. S. 56, 63, 14 S. C. 259, 38 L. Ed. 70; *Merchants Cotton Press & Storage Co.* v. *The Insurance Company of North America* (1894), 151 U. S. 368, 385, 14 S. C. 367, 38 L. Ed. 195, 204; *Mason City & Fort Dodge R. R. Co.* v. *Boynton* (1907), 204 U. S. 570, 27 S. C. 321, 51 L. Ed. 629; *Venner* v. *Great Northern Railway Company* (1908), 209 U. S. 24, 28 S. C. 328, 52 L. Ed. 666; *Niles-Bennett-Pond Co.* v. *Iron Moulders Union* (1920), 254 U. S. 77, 41 S. C. 39, 65 L. Ed. 145.

Reason IV hereafter is referable to Question No. II.

Reason IV.

In entertaining the appeal of respondents from an order of the District Court overruling a motion for reconsidera-

tion of motion to remand, which motion to reconsider was filed subsequent to the rendition of judgment on the merits in the Trial Court, the Circuit Court of Appeals held in effect that such order of the District Court was a final judgment from which an appeal might be taken to the Circuit Court of Appeals. Such action upon the part of the honorable Circuit Court of Appeals is in conflict with the holdings in the following cases to the effect that an appeal can not be taken from an order overruling a motion to remand: *Bender* v. *The Pennsylvania Company,* 148 U. S. 502, 13 S. C. 640, 37 L. Ed. 537; *Arthur* v. *Edmunds* (C. C. A. Fifth Circuit) 66 F. (2d) 21; *Lockhart* v. *New York Life Insurance Co.* (C. C. A. Fourth Circuit), 71 F. (2d) 684; *Klein* v. *Wilson & Co.* (C. C. A. Third Circuit), 7 F. (2d) 777.

Conclusion.

Wherefore, for the reasons herein advanced, it is respectfully submitted that the Supreme Court should exercise its jurisdiction to review by writ of certiorari the judgment of the Circuit Court of Appeals to the end that an important question of Federal law involving the construction of a Federal statute relating to removal jurisdiction be settled and an end be put to the conflict in the decisions of the various Circuit Courts of Appeals and other inferior coufts.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of Courts Below.

The unreported oral opinion of the United States District Court for the Northern District of Texas, rendered in open court, when motion to remand was overruled, appears at Page 108 of Record.

The opinion of the United States Circuit Court of Appeals, Fifth Circuit, rendered on December 6th, 1940, appears at Page 127 of Record and is reported in 115 F. (2d) at Page 880.

Grounds on Which Jurisdiction is Invoked.

A statement of grounds of jurisdiction is contained in the petition. The judgment of the United States Circuit Court of Appeals (R. 134) reversed the judgment of the District Court and remanded this case to the District Court with instructions to remand to the State Court from which it was removed. Such judgment of the Circuit Court of Appeals was entered on the 6th day of December, 1940 (R. 134). A petition for rehearing was filed December 26, 1940 (R. 136) and same was denied January 14th, 1941 (R. 145). Petition for certiorari is presented herein on the 30th day of January, 1941. Jurisdiction is invoked under Section 240 (a) of the Judicial Code as Amended by Act of February 13, 1925, c. 229, Section 1 (43 Stat., 938; 28 U. S. C. A. Section 347). The case of *Gay* v. *Ruff*, 292 U. S. 25, 78 L. Ed. 1099, 54 S. C. 608, supports jurisdiction.

Statement of Case.

A statement of the case is contained under the heading "Statement of Matter Involved" in the foregoing petition, Pages 2 to 3, and same will not be repeated here. We

emphasize: that the verified account originally sued upon by petitioners (R. 1 to 60) was not denied under oath by respondents in their original answer (R. 64 to 68), and that the correctness of the plaintiff's account sued upon was thereby admitted under Article 3736, Revised Civil Statutes of Texas, as Amended 1931 (Note 1, Appendix); that the cross-action filed by respondents against petitioner (R. 67-68) was found by the trial court in its opinion (R. 108 to 117) and the Circuit Court of Appeals in its opinion (R. 127 at 127, 128 and 129) to be a counterclaim for damages in excess of $3,000.00 for breach of contracts unrelated to the indebtedness sued upon originally by the petitioner, a citizen of Delaware. It is true that the respondents in their answer allege defensively that the products admittedly furnished by petitioner to respondents were furnished under an agreement violating the Texas Anti-Trust Statutes, and by such answer respondents sought to defeat all liability upon plaintiff's account (R. 64 to 67), but the cross-action prayed for $7,200.00 damages (R. 67-68) for breach of separate contracts. In the motion to remand filed by respondents in the Trial Court, respondents admitted (R. 79) that the petition for removal was filed in time required by law, that is, before the time petitioner was required to answer the cross-action.

Specifications of Error.

I.

The Honorable Circuit Court of Appeals for the Fifth Circuit erred in remanding this case and in holding that the cross-action filed by the respondents in the District Court of Parmer County, Texas, in which respondents, citizens of Texas, sought damages totalling $7,200.00 against petitioner, a citizen of Delaware, for the alleged breach of contracts separate and distinct from the indebtedness originally

sued upon, was not a suit removable by the petitioner as a defendant, for the reason that such decision and holding incorrectly interprets Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71) and is contrary to the weight of authority.

II.

The Honorable Circuit Court of Appeals erred in remanding this case and in holding that petitioner, a citizen of Delaware, was not entitled under the provisions of Section 28 of the Judicial Code as Amended, as defendant in the cross-action, to remove the cross-action or counterclaim filed by respondents, citizens of Texas, in the District Court of Parmer County, Texas, from such State Court to the Federal Court, for the reason that such holding and decision improperly interprets such statute and is contrary to the weight of authority.

III.

The Honorable Circuit Court of Appeals erred in entertaining the respondents' appeal to such court from the order of the Trial Court overruling respondents' motion to reconsider their motion to remand, filed after judgment on the merits, for the reason that such order or decree was not a final judgment from which an appeal lies.

ARGUMENT.

Point I.

Summary:

The Circuit Court of Appeals erred in holding that the cross-action of respondents was not a suit that could be removed by petitioner as a defendant under the Removal Act.

Referable to Question I and Reasons I, II, and III in Petition, and Specifications of Error I and II in Brief:

For brevity and to avoid being repetitious, the Argument under Specifications I and II will be combined under this point.

Argument and Authorities under Point I:

The relevant portion of the statute involved herein, being a part of Section 28 of the Judicial Code as Amended (28 U. S. C. A. Section 71) is as follows:

> "Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State."

The decision and holding of the Circuit Court of Appeals herein was to the effect that the counterclaim of the respondents was not a suit within such statute and the petitioner herein was not a defendant within such statute. The cross-action or counterclaim filed by the respondents sought affirmative relief for more than $3,000.00 on a matter unrelated to the verified account sued upon by petitioner. Under Texas practice such cross-action or counterclaim is a suit. The rule in Texas upon such subject is well stated in 38 *Texas Jurisprudence,* Page 292, Section 6, as follows:

> "A cross-bill or cross-action, or a plea in reconvention, or a set off or counterclaim is, or occupies the same position as, an independent suit by the defendant in the original suit against the plaintiff. As to the matter asserted in his cross-action or plea the defendant is the actor or plaintiff; and he has the rights and responsibilities of a plaintiff; while the plaintiff in the original suit is a defendant, with the privileges of a defendant. In other words, each party is plaintiff in respect to his own particular grievance and each party is defendant in respect to the grievance of the other. There are two

cases which may be tried together in the same proceeding or it has been said two actions are really combined into one."

Such text is amply supported by authorities cited in such text. The Supreme Court of the United States has recognized that the defendant in a cross-action upon the filing of a cross-action or counterclaim becomes the actor and is as to such cross-action the plaintiff or actor. *Merchants Heat and Light Company* v. *James B. Clow & Sons* (1907) 204 U. S. 286, 290; 51 L. Ed. 488, 490; 27 S. C. 285; *W. S. Kirby* v. *American Soda Fountain Company* (1904), 194 U. S. 141, 48 L. Ed. 911, 24 S. C. 619.

Since the first enactment of Section 28 of the Judicial Code in substantially its present form in 1887, and amendment in 1888 (Act of March 3, 1887, c. 337, Sec. 1, 24 Stat. 552; Act of August 13, 1888, c. 866, Sec. 1, 24 Stat. 433) more than twenty-five reported cases in the District Courts or Circuit Courts of Appeals have passed upon the right of a defendant in a cross-action seeking affirmative relief to remove such cross-action or counterclaim to the Federal Court. The decisions upon such question are in hopeless conflict. By far the greater number of cases and petitioner submits the better reasoned cases, uphold the right of an original plaintiff to remove to the Federal Court such cross-action or counterclaim seeking affirmative relief under the statute above quoted. There are a few cases which deny the right to so remove. These cases are in the minority, however, and were decided in many instances before the beginning of the present century. The Circuit Court of Appeals herein in its opinion (R. 129-130) recognized that the majority of the decisions were contrary to the decision of the Circuit Court of Appeals herein. The rule that petitioner contends governs the ultimate decision in this case is briefly stated in *Bankers Securities Corporation* v. *Insur-*

ance Equities Corporation (1936 C. C. A. Third Circuit) 85 F. (2d) 856, as follows:

> "When a counterclaim is filed, the plaintiff becomes the defendant in the cause of action set forth therein, and this extends to removal proceedings from a State court to a Federal court."

The decisions upholding the right of a plaintiff to remove a counterclaim filed against it to the Federal Court under the removal statute above quoted is recognized or upheld in the following cases:

Bankers Securities Corporation v. *Insurance Equities Corporation,* (C. C. A. Third Circuit N. J. 1936), 85 F. (2d) 856;

Chambers v. *Skelly Oil Company* (C. C. A. Tenth Circuit 1937), 87 F. (2d) 853;

Wichita Royalty Co. v. *City National Bank* (D. C. Tex.), 18 Fed. Supp. 609, Affirmed (C. C. A. Fifth Circuit 1938), 95 F. (2d) 671; Affirmed by the Supreme Court without referring to the jurisdictional question, 306 U. S. 103, 83 L. Ed. 515;

Carson and Rand Lumber Co. v. *Holtzclaw* (D. C. Mo. 1889), 39 Fed. 578;

Walcott v. *Watson* (C. C. Nev. 1891), 46 Fed. 529;

Price & Hart v. *T. J. Ellis & Co.* (C. C. Ark. 1904), 129 Fed. 482;

Hagerla v. *Mississippi River Power Co.* (C. C. Iowa 1912), 202 Fed. 771;

Hansen v. *Pacific Coast Asphalt Cement Co.* (D. C. Calif. 1917), 243 Fed. 283;

Chicago, M. & St. P. Ry. Co. v. *City of Spencer* (D. C. Iowa 1922), 283 Fed. 824;

Consolidated Textile Corporation v. *Iserson* (D. C. N. Y. 1923), 294 Fed. 289;

Pierce v. *Desmond* (D. C. Minn. 1926), 11 F. (2d) 327;

Mohawk Rubber Co. of New York v. *Terrell* (D. C. Mo. 1926), 13 F. (2d) 266;

Zumbrunn v. *Schwartz* (D. C. Ind. 1927), 17 F. (2d) 609;

San Antonio Suburban Irrigated Farms v. *Shandy* (D. C. Kan. 1928), 29 F. (2d) 579;

Evetts v. *Peoples Life Insurance Co.* (D. C. Tex. 1929), 36 F. (2d) 832;

American Fruit Growers, Inc. v. *La Roche* (D. C. S. C. 1928), 39 F. (2d) 243;

Houlton Savings Bank v. *American Laundry Machinery Company* (D. C. Me. 1934), 7 Fed. Supp. 858;

Groveville Sales Corporation v. *Stevens* (D. C. N. J. 1936), 16 Fed. Supp. 563;

O'Neill Bros., Inc. v. *Crowley* (D. C. S. C. 1938), 24 Fed. Supp. 705;

Baker v. *Keebler* (D. C. Tenn. 1939), 29 Fed. Supp. 555.

The following cases deny on one ground or another the right of removal to a defendant in a cross-action:

Waco Hardware Company v. *Michigan Stove Company* (C. C. A. Fifth Circuit 1899), 91 Fed. 289;

McKown v. *Kansas and Texas Coal Company* (C. C. Ark., 1901), 105 Fed. 657;

Indiana Mountain Jellico Coal Company v. *Asheville Ice and Coal Company* (C. C. N. C. 1905), 135 Fed. 837;

Illinois Central Ry. Co. v. *A. Waller & Co.* (C. C. Ky. 1908), 164 Fed. 358;

Glover Machine Works v. *Cooke-Jellico Coal Company* (D. C. Ky. 1915), 222 Fed. 531.

The annotator in Note 668 of 28 U. S. C. A. Section 71 says:

"The authorities are in hopeless discord upon the question whether, when a counterclaim or cross-bill is

> filed, the plaintiff or the defendant to the original suit is to be regarded as defendant for the purpose of removal."

Petitioner submits by reason of such conflict the Supreme Court should exercise its jurisdiction to grant the writ of certiorari.

It is respectfully submitted that the decision and holding of the honorable Circuit Court of Appeals in the present case that the term "defendant or defendants" as used in the portion of the removal statute above quoted does not apply to a plaintiff or cross-defendant (R. 129), likewise conflicts with decisions of the Supreme Court and other Circuit Courts of Appeals. Mr. Justice Holmes, speaking for the court in *Mason City & Fort Dodge Railway Company* v. *Boynton*, 204 U. S. 570, 579; 51 L. Ed. 629, 633; 27 S. C. 321, and referring to the statute in question, stated:

> "But this court must construe the act of Congress regarding removal. And it is obvious that the word "defendant" as there used is directed toward more important matters than the burden of proof or the right to open and close."

The Supreme Court has repeatedly held that under the Judicial Acts of 1875 and 1887 (March 3, 1875 c. 137, Sec. 2, 18 Stat. 470; March 3, 1887, c. 373, Sec. 1, 24 Stat. 552; August 3, 1888, c. 866, 25 Stat. 433) that in determining the right of removal, the parties should be realigned in accordance with the matter in dispute without regard to the position they occupy in the pleadings as plaintiff or defendant. Removal Cases (1879), 100 U. S. 457, 25 L. Ed. 593; *Brown* v. *Ironsdale* (1891), 138 U. S. 389, 11 S. C. 308, 34 L. Ed. 987; *Wilson* v. *Oswego Township* (1894), 151 U. S. 56, 63, 14 S. C. 259, 38 L. Ed. 70; *Merchants Cotton Press & Storage Co.* v. *The Insurance Company of North America* (1894), 151 U. S. 368, 385, 14 S. C. 367, 38 L. Ed. 195, 204;

Mason City & Fort Dodge R. R. Co. v. *Boynton* (1907), 204 U. S. 570, 27 S. C. 321, 51 L. Ed. 629; *Venner* v. *Great Northern Railway Company* (1908), 209 U. S. 24, 28 S. C. 328, 52 L. Ed. 666; *Niles-Bennett-Pond Co.* v. *Iron Moulders Union* (1920), 254 U. S. 77, 41 S. C. 39, 65 L. Ed. 145. The right of a third party brought in by a cross-action to remove under our present removal statute has likewise been recognized in *Habermel* v. *Mong* (1929 C. C. A. Sixth Circuit) 31 F. (2d) 822, Writ of Certiorari denied, 280 U. S. 587, 74 L. Ed. 636, 50 S. C. 37; *Houlton Savings Bank* v. *American Laundry Machinery Company* (1934 D. C. Me.), 7 Fed. Supp. 858; *Ellis* v. *Peak* (1938 D. C. Tex.) 22 Fed. Supp. 908.

The honorable Circuit Court of Appeals in the present case cites the decision of the Supreme Court in *West* v. *The City of Aurora* (1868) 73 U. S. 18, 6 Wall. 139, 18 L. Ed. 819, as being controlling in the present case. The facts very briefly are that the plaintiffs in error were plaintiffs in the State court. The nature of the suit was not clear to the Supreme Court but appeared to be for the recovery of the amount of interest coupons of certain bonds. The City filed an answer setting up defensive matter and prayed for an injunction against the plaintiffs from further proceeding in any suit on the coupons or bonds. On the filing of these additional paragraphs, plaintiffs dismissed their original suit and sought to remove the new matters to the Federal Court. The action was remanded. The Supreme Court held that such action was proper. This case was decided under the Judiciary Act of 1789 (Act of September 24, 1789, c. 20, 1 Stat. 73), the pertinent part (Section 12) of such statute being as follows:

> "That if a suit be commenced in any State court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, and the matter in dispute exceeds the aforesaid sum or

value of $500.00, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such State court, file a petition for the removal of the case for trial into the next circuit court * * *" (Historical Note, 28 U. S. C. A. Section 71).

This decision of the Supreme Court has been distinguished from the question here presented on three distinct grounds by other Circuit Courts and District Courts. The grounds of such distinction are:

(1) The Act of 1789 and the present removal statute are materially different in that the Act of 1789 limited the right of removal to a defendant "who shall at the time of entering his appearance in such State court * * *" file a petition for removal, while such requirement is not in our present Judicial Code. *Habermel* v. *Mong* (1929 C. C. A. Sixth Circuit) 31 F. (2d) 822, Writ of Certiorari denied, 280 U. S. 587, 74 L. Ed. 636, 50 S. C. 37; *O'Neill Bros.* v. *Crowley* (1938 D. C. S. C.) 24 Fed. Supp. 705; *San Antonio Suburban Irrigated Farms* v. *Shandy* (1928 D. C. Kan.) 29 F. (2d) 579; *Zumbrunn* v. *Schwartz* (1927 D. C. Ind.) 17 F. (2d) 609 *Price & Hart* v. *T. J. Ellis and Co.* (1904 C. C. Ark.), 129 Fed. 482;

(2) The so-called cross-action filed by the defendant in the *West* case presented defensive matters only and was merely supplemental proceedings ancillary to the main suit. *Ward* v. *Congress Construction Company* (1900 C. C. A. Seventh Circuit) 99 Fed. 598; *O'Neill Bros.* v. *Crowley* (1938 D. C. S. C.) 24 Fed. Supp. 705; *San Antonio Suburban Irrigated Farms* v. *Shandy* (1928 D. C. Kan.) 29 F. (2d) 579; *Pierce* v. *Desmond* (1926 D. C. Minn.) 11 F. (2d) 371; *Hagerla* v. *Mississippi River Power Company* (1912 D. C. Iowa) 202 Fed. 771; *Walcott* v. *Watson* (1891 C. C. Nev.) 46 Fed. 529;

(3) The record in the *West* case, as pointed out by the court therein, was so fragmentary as to be unintelligible. *O'Neill Bros.* v. *Crowley* (1938 D. C. S. C.) 24 Fed. Supp. 705; *San Antonio Suburban Irrigated Farms* v. *Shandy* (1928 D. C. Kan.) 29 F. (2d) 579.

Point II.

Summary:

The order of the Trial Court overruling respondents' motion for reconsideration of its order overruling motion to remand is not a final judgment from which an appeal lies to the Circuit Court of Appeals.

Referable to Question II and Reason IV in Petition and Specification of Error III in Brief:

Argument and Authorities Under Point II:

When this cause was removed to the Federal Court, respondents filed their motion to remand (R. 76 to 80) which was overruled (R. 80) before trial on the merits. After rendition of judgment on trial on the merits (R. 81), the respondents filed their motion for new trial and for reconsideration of their motion to remand (R. 85 to 93). This was overruled (R. 93-94). Respondents' notice of appeal (R. 95), the cost bond (R. 96), respondents' application for leave to appeal (R. 101), the order allowing appeal (R. 103), and assignments of error (R. 103-107) all recite in substance that the appeal is taken from the order of the Trial Court overruling the respondents' motion for reconsideration of their motion to remand. No appeal was taken from the judgment on the merits rendered on October 13, 1939 (R. 81). It is respectfully submitted that such an order or judgment of the Trial Court is not a final judgment from which an appeal may be taken and it is respectfully submitted that the action of the honorable Circuit Court of Appeals in entertaining this appeal is in

conflict with the following decisions: *Bender* v. *The Pennsylvania Company* (1893) 148 U. S. 502, 37 L. Ed. 537, 13 S. C. 640; *Arthur* v. *Edmunds* (1933 C. C. A. Fifth Circuit) 66 F. (2d) 21; *Lockhart* v. *New York Life Insurance Company* (1934 C. C. A. Fourth Circuit) 71 F. (2d) 684; *Klein* v. *Wilson & Co.* (1925 C. C. A. Third Circuit) 7 F. (2d) 777; which cases hold that an order overruling a motion to remand is not a final judgment from which an appeal lies. The petitioner recognizes that on an appeal from a final judgment in a case or on appeals from interlocutory orders which are made appealable by statute, that the appellate court has jurisdiction to review the action of the Trial Court in refusing a motion to remand. In the instant case, no appeal was attempted to be taken from the final judgment on the merits rendered on October 13, 1939, but the only judgment or order appealed from is an order rendered after final judgment on a motion to reconsider a motion to remand, which motion to reconsider was filed subsequent to the judgment on the merits. If action on a motion filed after a final judgment to reconsider a previous interlocutory order of the Trial Court is a final judgment from which an appeal may be taken, the power to evade the provisions of the statute that an appeal may be taken from a final judgment only is put in the power of either party and there could be no limitation as to the time that such motions might be filed and appeals taken.

Conclusion.

It is respectfully submitted that by reason of the importance of the question involved being a question of the proper construction of a Federal statute and involving removal jurisdiction, and because of the irreconcilable conflict between the Circuit Courts of Appeals upon the question involved that the Supreme Court of the United States should exercise its jurisdiction and grant a writ of

certiorari in this cause to the United States Circuit Court of Appeals for the Fifth Circuit to review the judgment of said court entered on the 6th day of December, 1940, and that upon such review the judgment of said court be reversed and the judgment of the United States District Court for the Northern District of Texas be affirmed.

Respectfully submitted,

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APPENDIX.

NOTE 1.—Article 3736, Revised Civil Statutes of Texas, as amended 1931:

"When any action or defense is founded upon an open account or other claim or claims for goods, wares and merchandise, including claims or suits for liquidated money demands based upon written contracts or based on business dealings between the parties, or for personal service rendered, on which a systematic record of said account has been kept, supported by the affidavit of the party, his agent or attorney, taken before some officer authorized to administer oaths, to the effect that such cause of action is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same shall be taken as prima facie evidence thereof, unless the party resisting such claim shall, before an announcement of ready for trial in said cause, file a written denial, under oath, stating that such account is not just or true, in whole or in part, and if in part only, stating the items and particulars which are unjust; provided, that when such counter-affidavit shall be filed on the day of the trial the party claiming under such verified account shall have the right to continue such cause until the next term of court; when he fails to file such affidavit, he shall not be permitted to deny the account, or any item therein as the case may be."

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